MOTION FILED
MAR 3 1977

76-211

IN THE SUPREME COURT OF THE UNITED STATES

Monroe County Probate Court, et al.,

Petitioners

vs. No. A-1067

Dahlari Weldon, et al.,

Respondents

* * *

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT FOR WRIT OF CERTIORARI AND BRIEF BY THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES

* * *

FRED S. FINDLING, P.C.

By: Fred S. Findling
By: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile Judges Association, and the Michigan Federation of Private Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366

IN THE SUPREME COURT OF THE UNITED STATES

Monroe County Probate Court,
et al.,

Petitioners

vs. No. A-1067

Dahlari Weldon, et al.,

Respondents

* * *

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT FOR WRIT OF CERTIORARI AND BRIEF BY THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES

* * *

FRED S. FINDLING, P.C.

by: Fred S. Findling, and
by: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile
Judges Association, and
Michigan Federation of Private
Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366

TABLE OF CONTENTS

Page

Motion for Leave to File Brief on Behalf of the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies, *Amici Curiae* 1

Resolution of the Michigan Probate and Juvenile Judges Association 3

Resolution of the Michigan Federation of Private Child and Family Agencies 4-5

Brief for the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies, *Amici Curiae* 6-13

I. Questions Presented 6-7

II. Statutes Involved 7-9

III. Argument 9-12

IV. Conclusion 12

V. Certificate of Service 13

CITATIONS

CASES **Page**

Preiser v Rodriguez, 411 US 475, 36 L Ed 2d 439, 93 S Ct. 1827 (1973) 12

Reist v Bay Circuit Judge, 396 Mich 326, 241 NW 2d 55 (1976) 12

Younger v Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct. 746 (1971) 11

STATUTES

MCLA 712A.19a 10

MCLA 712A.21 10-11

MCLA 712A.22 10-11

MCLA 600.4307 10-11

COURT RULES

JCR 1969, 6.3(A) (2) (b) 10

MOTION

The Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies seek leave to file Brief *Amicus Curiae* in support for Writ of Certiorari for the following reasons:

1. On July 25, 1974, the federal district court granted Respondents a declaratory judgment holding that the proceedings by the Monroe County Probate Court violated Respondents' due process rights. The federal district court retained jurisdiction until conclusion of litigation in the courts of the state of Michigan. This declaratory judgment was granted even though Respondents had failed to exhaust available state remedies.

2. The United States Court of Appeals for the Sixth Circuit affirmed.

3. These decisions by the courts below jeopardize all adoption proceedings in the state of Michigan and threaten with uncertainty the lives of children whose greatest need is certainty.

4. These decisions by the courts below reinsert the federal courts into areas where this Court, in recent decisions, has, as a matter of law and policy, prohibited federal court intervention.

WHEREFORE, the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies request this Court to

grant them leave to file a Brief *Amicus Curiae* in support for Writ of Certiorari.

FRED S. FINDLING, P.C.

By: FRED S. FINDLING
By: JOSEPH FINDLING
Attorneys for Michigan Probate and
Juvenile Judges Association
and
Michigan Federation of Child
and Family Agencies, *Amici Curiae*
3005 Cadillac Tower
Detroit, MI 48226
965-1366

Dated: February 23, 1977

RESOLUTION
MICHIGAN PROBATE AND
JUVENILE COURT JUDGES ASSOCIATION,
EXECUTIVE COMMITTEE
JANUARY 27, 1977

WHEREAS, the MPJCJA recognizes the magnitude of the jurisdictional questions involved in the Weldon case currently on Petition for Certiorari to the United States Supreme Court, and,

WHEREAS, the Michigan Federation of Private Child And Family Agencies has also expressed their concern by Resolution adopted January 13, 1977, and

WHEREAS, an Order Terminating Parental Rights is the cornerstone in all adoptions and collateral attack on such Orders in the Federal Courts destroys the finality of said Orders and renders all adoptions subject to such attacks rather than being reviewed by way of appeal and/or Habeas Corpus in the State Courts.

IT IS MOVED AND SUPPORTED, that the Judges Association seek to intervene by Amicus Curiae brief either separately or jointly with the Michigan Federation of Private Child And Family Agencies. Motion carried.

MICHIGAN FEDERATION
OF PRIVATE CHILD AND FAMILY AGENCIES
1035 North Washington Avenue
Lansing, Michigan 48906
Phone: (517) 485-8552

January 21, 1977

Mr. James Rostach
Attorney at Law
21 Washington Street
Monroe, MI 48161

Dear Mr. Rostach:

This letter will confirm the message I shared with you by phone on January 14 indicating the moral support and commitment to help with some funding on the case moving toward the U.S. Supreme Court. The following resolution was passed by the Federation's Board of Directors and the Federation membership at their meeting on January 13, 1977:

> WHEREAS the Monroe County Probate Court staff and the Monroe County commissioners have been carrying the moral and financial load of a legal challenge to good adoption practice by themselves until now: and
>
> WHEREAS, the issues are:
> a challenge to the permanency of the Order Terminating Parental Rights, as well as a challenge to the established method of appeals within the State Court structures, instead utilizing the Federal Court System; and
>
> WHEREAS these issues will affect all adoptions and all agencies doing adoption work;
>
> BE IT RESOLVED that the Federation encourage the attorneys representing the Monroe

> County Court staff to request a hearing by the U.S. Supreme Court, and that the Federation commit funds to help offset the costs of presenting this issue to the Supreme Court if it is needed.

I trust that you will keep in touch with me as plans progress.

Very sincerely yours,

Hudson J. Nyenhuis

Hudson J. Nyenhuis, Chairman
Federation Adoption Committee

hjn/ak

IN THE SUPREME COURT
OF THE UNITED STATES

Monroe County Probate Court,
et al.,

Petitioners

vs. No. A-1067

Dahlari Weldon, et al.,

Respondents

* * *

BRIEF FOR THE MICHIGAN PROBATE AND JUVENILE JUDGES ASSOCIATION AND THE MICHIGAN FEDERATION OF PRIVATE CHILD AND FAMILY AGENCIES IN SUPPORT FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED.

There are two questions which have far-reaching consequences to the Michigan Probate Courts and the Michigan agencies involved in adoptions whose task it is to bring finality, order and certainty into the lives of many children who merited the interest and involvement of the state because of the failure of their parents to provide them with proper nurture and care.

1. Should collateral attack in federal district court, to matters of termination of parental rights arising out of state courts, be permitted before there has been an exhaustion of remedies in the state courts?

2. Does the declaratory judgment and retention of jurisdiction by the federal district court, affirmed by the United States Court of Appeals for the Sixth Circuit, pre-

vent independent consideration by the state courts of relevant issues?

II. STATUTES INVOLVED.

MCLA 712A.19a:

Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

(a) The child has been deserted and abandoned without provision for identification for a period of at least 6 months and the public or private agency having temporary custody of the child has made a reasonable attempt to locate the parent.

(b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian.

(c) A parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child.

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or

guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

(e) The parent or guardian is unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months.

MCLA 712A.21:

Any interested person, at any time while the child is under the jurisdiction of the court, may file a petition, in writing and under oath, for a rehearing upon all matters coming within the provisions of this chapter, and upon the rehearing the court may affirm, modify or set aside any order so reviewed. If parental rights have been terminated by an order entered in the proceedings and custody of the child has been removed from the parents, guardian or other person, the petition for rehearing shall be filed within three months from the date of entry of the order terminating parental rights . . . . The rehearing shall be conducted in accordance with the provisions of this chapter relative to the conduct of original hearings. At any time the court may enter an order for supplemental disposition as long as the child remains under the jurisdiction of the court.

MCLA 712A.22:

Appeal may be taken to the circuit court by the prosecuting attorney or any person aggrieved by any order of the juvenile division of the probate court. . . . The

pendency of an appeal shall not suspend the order unless the circuit court shall specifically so order. A petition for a delayed appeal shall be filed within six months after the making of the judgment or order complained of.

MCLA 600.4307:

An action for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in Section 4310.

COURT RULE INVOLVED

JCR 1969, 6.3(A) (2)

Unless waived as provided by Rule 6.2, counsel shall be appointed on the court's own motion to represent the parents, guardian or custodian of the child charged with offense against the child at hearings which may involve termination of their rights when legal aid or public defender counsel is not available, and they are financially unable to employ counsel to represent themselves. The court may, upon request therefor, when legal aid or public defender counsel is not available and they are financially unable to employ counsel to represent themselves, appoint counsel to represent such persons at other hearings conducted under provisions of the Juvenile Code or these Rules.

III. ARGUMENT.

The case at bar is the best reason why there should be exhaustion of adequate and available state court remedies before resort is had to the federal courts.

For five years, the life of Maria Weldon has been in limbo because Respondents, failing to avail themselves of available remedies in state court, have sought recourse to a federal court they thought more suitable to their purpose.

If such forum-shopping is to be allowed, the social effect may well be disastrous.

Every year thousands of children are adopted in the state of Michigan, many of whom were made available for adoption through neglect and dependency proceedings resulting in termination of parental rights.

The law to be applied in Michigan in termination of parental rights proceedings, is well settled and provisions for the presence of counsel to represent both parents and children are mandatory. JCR 1969, 6.3(A)(2)(b).

Guidelines are available to the probate courts to insure uniform state-wide consideration of criteria to be applied by the courts in determining termination of parental rights and permanent custody. MCLA 712A.19a.

There are provisions for rehearing, MCLA 712A.21; appeal, MCLA 712A.22; and habeas corpus, MCLA 600.4307.

No Michigan adoption can be settled if parties to a termination of parental rights proceedings may, at their election, have recourse to federal courts before exhausting state court remedies.

If such a situation were permitted, litigants would not be able to rely on Michigan statutes and case law but would have to be ever mindful of decisions which might come down from the federal courts on a case by case basis.

On the national scale, the implications are horrendous.

The trauma to the children involved in these matters can be great. The perception of time by children differs from that of adults and to a small child an hour may seem like a month, a month like a year, and a year like eternity.

The federal district court also expressed its concern

over the traumatic consequences which would result should the court stay its hand after having come so far.

However, for the federal district court to view this as a basis for asserting jurisdiction is bootstrap reasoning. The feared potential trauma was engendered by the federal district court asserting jurisdiction where none was warranted.

The assertion of federal court jurisdiction presupposes the inability of a state forum to arrive at a just and equitable determination of the issues.

The claim of the federal district court, that the state courts declined to consider the issues raised in this action, is in error.

The assertion of jurisdiction by the federal district court pre - empted state consideration of the issues. The res judicata effect given the judgment of the federal district court prevented the state courts from ever reaching the merits of Respondents' case.

In *Younger v Harris*, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971), this Court barred federal courts from enjoining state criminal proceedings excepting extraordinary circumstances.

There is no assertion on the part of Respondents attacking the constitutionality of Michigan law or asserting any of the above extraordinary circumstances.

Respondents did not avail themselves of three applicable statutory remedies, to-wit: MCLA 712A.21 - Rehearing; MCLA 712A.22 - Appeal; MCLA 600.4307 - Habeas Corpus.

The availability of state remedy extends to allowing an appeal pro forma pauperis to state circuit court from termination of parental rights, including the appointment of counsel and availability of free transcripts. *See:*

Reist v Bay Circuit Judge, 396 Mich 326, 241 NW 2d 55 (1976).

Applying *Preiser v Rodriguez,* 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827 (1973), the federal district court held that, because Respondents failed to exhaust available state remedies, the federal district court lacked jurisdiction to order the return of Maria Weldon to her mother.

The federal district court is asserting jurisdiction to supervise state courts even though *Preiser* prevents it from asserting jurisdiction to act.

III. CONCLUSION.

Retention of jurisdiction by the federal district court implies that further proceedings in the state courts, and judgments resulting therefrom, must meet the approval of the federal district court. This, in effect, is tantamount to a collateral attack on all state court actions not in conformity with the opinion of the federal district court.

Respondents' original request for relief in the federal district court, in its barest form, was a request for habeas corpus which, pursuant to *Preiser,* required the exhaustion of available state court remedies.

Based on the issues presented and consideration of federal policy, the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies respectfully request that this Court grant a writ of certiorari to review the February 12, 1976 decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FRED S. FINDLING, P.C.

By: FRED S. FINDLING
By: JOSEPH FINDLING
Juvenile Judges Association
and
Michigan Federation of Children
and Family Agencies, *Amici Curiae*
3005 Cadillac Tower
Detroit, MI 48226
965-1366

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* in Support for Writ of Certiorari by the Michigan Probate and Juvenile Judges Association and the Michigan Federation of Private Child and Family Agencies were caused to be duly served on Edward H. Devoe and Bugbee & Conkle, by Warren D. Wolfe, Attorneys for Petitioners Judge Harry J. Seitz, James Stanifer and Shirley Friess, 13th Floor, Toledo Trust Bldg., Toledo, Ohio 43604; Gabe Kaimowitz, Attorney for Respondents Dahlari Weldon and Marie Sophia Weldon, Wayne State School of Law, Annex Building, Detroit, Michigan 48202; and Bettye S. Elkins, Esq., Guardian ad Litem for Respondent Maria Sophia Weldon, 2700 City National Bank Bldg., Detroit, Michigan 48226, by ordinary United States mail, first class postage prepaid, this 2nd day of March, 1977.

FRED S. FINDLING, P.C.

By: Fred S. Findling
By: Joseph Findling
Attorneys for *Amici Curiae*
Michigan Probate and Juvenile
Judges Association, and the
Michigan Federation of Private
Child and Family Agencies
3005 Cadillac Tower
Detroit, MI 48226
(313) 965-1366